FILED
FEB 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-685

# In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
JEFFREY S. BUCHOLTZ
*Acting Assistant Attorney General*
MARK B. STERN
ALISA B. KLEIN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico may compel the federal government to provide it with information and materials concerning federal law enforcement operations, for the purpose of investigating those federal operations.

## TABLE OF CONTENTS

Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 1
Argument ..... 7
Conclusion ..... 11

## TABLE OF AUTHORITIES

Cases:

*Black* v. *Sheraton Corp. of Am.*, 564 F.2d 531 (D.C. Cir. 1977) ..... 9
*Exxon Shipping Co.* v. *Department of the Interior*, 34 F.3d 774 (9th Cir. 1994) ..... 8
*Houston Bus. Journal, Inc.* v. *Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996) ..... 8
*Linder* v. *Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001) ..... 8
*Maryland* v. *Soper*, 270 U.S. 36 (1926) ..... 7
*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) ..... 9
*United States* v. *O'Neill*, 619 F.2d 222 (3d Cir. 1980) .... 10
*United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951) ..... 2

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* ..... 5
Freedom of Information Act, 5 U.S.C. 552 ..... 6
5 U.S.C. 552(b)(7) (1970) ..... 9

Regulations and rule—Continued: Page

28 C.F.R.:
Sections 16.21 *et seq.* ..... 2
Section 16.22(a) ..... 2
Section 16.26(b) ..... 2
Section 16.26(b)(5) ..... 2
Fed. R. Civ. P.:
Rule 45 ..... 8

# In the Supreme Court of the United States

No. 07-685

COMMONWEALTH OF PUERTO RICO, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-49) is reported at 490 F.3d 50. The decision of the district court (Pet. App. 52-92) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 15, 2007. A petition for rehearing was denied on August 29, 2007 (Pet. App. 94). The petition for a writ of certiorari was filed on November 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Federal agencies, including the Department of Justice (Department), have promulgated regulations that prohibit an agency employee from responding to a subpoena without agency permission. Such regulations

are known as *Touhy* regulations, a reference to this Court's decision upholding the validity of such regulations. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

The Department's current *Touhy* regulations, codified at 28 C.F.R. 16.21 *et seq.*, prohibit employees from producing material relating to their official duties without prior approval of the proper Justice Department official. 28 C.F.R. 16.22(a). The regulations set forth a non-exclusive list of instances in which approval should be denied, 28 C.F.R. 16.26(b), including instances in which "[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired," 28 C.F.R. 16.26(b)(5).

2. This case arises out of the efforts of the Federal Bureau of Investigation (FBI) to apprehend a fugitive, Filiberto Ojeda Ríos (Ojeda). In the 1970s, Ojeda helped found the Macheteros, an organization that advocates independence for Puerto Rico through armed struggle against the United States government. Pet. App. 3. In 1983, the Macheteros stole $7.1 million from a bank in Connecticut. *Ibid.* When the FBI apprehended Ojeda in 1985, he shot an FBI agent in the face, permanently blinding the agent in one eye. *Ibid.* Following a trial in Puerto Rico, Ojeda was acquitted of assaulting the agent. *Ibid.* He skipped bail while on trial for bank robbery and was sentenced in absentia in 1992. *Ibid.* Fifteen years later, in September 2005, the FBI attempted to apprehend Ojeda at his residence in Hormigueros, Puerto Rico. *Ibid.* Ojeda shot two FBI agents and was fatally wounded. *Ibid.*

Based on information obtained from Ojeda's residence, the FBI obtained a search warrant for a residential condominium in San Juan, Puerto Rico. Pet. App. 5. When the FBI executed the search warrant in February 2006, a large group of protesters, reporters, and members of the public gathered outside. *Ibid.* Some of those individuals breached an established police line, and an FBI agent used pepper spray to keep people behind the line. *Ibid.*

The Commonwealth of Puerto Rico (Commonwealth) seeks to investigate those FBI operations. In October 2005, a Commonwealth prosecutor issued a subpoena pursuant to Puerto Rico law, directing the United States Attorney to produce materials including: (1) a copy of the "Operation Order" establishing the plan or rules of engagement for the FBI raid on Ojeda's residence; (2) the name, rank, division, address, and telephone number of every person who participated in, knew of, or made any decision regarding the operation, as well as an organizational diagram showing the rank of these individuals in the line of command; (3) various equipment, including but not limited to all bullet-proof vests, helmets, weapons, and vehicles involved in the raid; (4) any inventory of the property seized during the raid; (5) copies of any expert reports relating to the raid or Ojeda's death; and (6) copies of any relevant general FBI protocols, including those relating to violent interventions and potentially deadly force. Pet. App. 3-4. In subsequent correspondence, the Commonwealth stated that the requests related to a "criminal investigation" into Ojeda's death. *Id.* at 4.

The Commonwealth issued similar subpoenas demanding the production of materials pertaining to the FBI's execution of the search warrant in February 2006.

Pet. App. 5. The Commonwealth demanded: (1) the name, rank, division, address, and telephone number of the two FBI agents who allegedly used pepper spray; (2) official photographs of those agents; and (3) internal FBI protocols relating to the use of force and pepper spray. *Id.* at 5-6.

The FBI declined to produce the requested materials, explaining that the Department's *Touhy* regulations prohibit the disclosure of records compiled for law enforcement purposes. Pet. App. 4, 29. The FBI indicated, however, that Commonwealth prosecutors would be allowed to examine the bulletproof vests, helmets, weapons, and vehicles used during the raid and the photographs taken before, during, and after the raid, as long as the FBI retained official custody of the items and an FBI official was present during the inspection. *Id.* at 4-5.

3. The Commonwealth brought suit in district court, seeking a declaratory judgment that it has a right "to conduct a full investigation into the events leading to the death of Mr. Ojeda Rios," and an order "permanently enjoining Defendants from withholding any information relevant to the Commonwealth's investigation and ordering Defendants to comply with the Commonwealth's request and produce the subpoenaed information, objects, and documents." Pet. App. 6-7. The Commonwealth sought identical relief with respect to its "investigation into the events allegedly leading to the injury of members of the press and/or the public . . . on February 10, 2006, due to the alleged use of excessive force (including the alleged use of pepper spray) by FBI agents." *Id.* at 7.

The district court dismissed the complaints. Pet. App. 52-93. Noting the FBI's interest in maintaining

the confidentiality of sensitive law enforcement techniques, the court held that the FBI's decision to withhold materials relating to the Ojeda raid was not arbitrary or capricious under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 8. With respect to the subpoena relating to the execution of the search warrant, the court held that there had been no final agency action because the Commonwealth, which had indicated that it did not intend to enforce the subpoena, had failed to take steps to secure a final agency decision. *Id.* at 6, 84-85.

4. The court of appeals affirmed. Pet. App. 1-49. The court first rejected the Commonwealth's contention that its sovereign interests entitle it to pursue a "non-statutory" cause of action independent of the APA. *Id.* at 9-18. The court explained that, "when a state's interest in investigating the agents of a federal law enforcement entity arguably conflicts with that federal entity's need to protect certain information relating to law enforcement activities, Congress has provided a mechanism—the APA—for resolving these conflicts." *Id.* at 17.

With respect to both subpoenas, the court of appeals determined that the FBI had acted reasonably in declining to produce its sensitive law enforcement materials. Pet. App. 18-43. The court explained that disclosure of the materials pertaining to the Ojeda raid "would reveal how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered." *Id.* at 33 (quotation marks omitted). It explained that

disclosure of the names and other personal information concerning individual FBI agents would jeopardize the agents' ability to conduct covert operations and expose the agents to harassment. *Id.* at 36-37, 42. The court concluded that the FBI's interest in maintaining the secrecy of its law enforcement materials was not overcome by the Commonwealth's interest in investigating the FBI's operations. *Id.* at 37-39.[1]

Concurring, Chief Judge Boudin noted that, because the APA provides the only relevant waiver of sovereign immunity, and no law requires the disclosure of the documents that the Commonwealth seeks, the Commonwealth has, "at best, * * * an APA suit to challenge agency action as arbitrary and capricious." Pet. App. 43-46. He explained that, while the Commonwealth "is free to conduct criminal investigations," it "is not free to bring a federal or state lawsuit to obtain by court process, at the behest of a state agency, documents and exhibits controlled by the United States, unless Congress has so provided." *Id.* at 44. Chief Judge Boudin observed that the FBI's interest in withholding law enforcement materials "is self-evident and is reflected in both the [Freedom of Information Act (FOIA), 5 U.S.C. 552] categorical exemption [for law enforcement records] * * * and in judicial recognition of a law enforcement privilege." *Id.* at 47.

Senior District Judge Shadur, sitting by designation, also concurred, noting that "the Commonwealth's legitimate interest in pursuing a possible criminal prosecution cannot override the legitimate policy concerns of the United States, as the ultimate sovereign, in not un-

[1] The court of appeals assumed, without deciding, that there was final agency action with respect to the subpoena pertaining to the execution of the search warrant. Pet. App. 39-42.

duly exposing its own law enforcement techniques and personnel against its wishes." Pet. App. 49.

5. The court of appeals denied the Commonwealth's petition for rehearing and rehearing en banc without recorded dissent. Pet. App. 94.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The Commonwealth contends (Pet. 21-30) that the FBI's decision to withhold its sensitive law enforcement materials should have been subject to de novo review, rather than deferential review under the APA. As the court of appeals held, however, the APA, including its arbitrary-and-capricious standard of review, provides the only potential basis for review. Pet. App. 12-18; *id.* at 44-46 (Boudin, C.J., concurring). The Commonwealth's asserted "nonstatutory" cause of action (Pet. 25) simply does not exist. As Chief Judge Boudin explained, the Commonwealth "is free to conduct criminal investigations," but "[i]t is not free to bring a federal or state lawsuit to obtain by court process, at the behest of a state agency, documents and exhibits controlled by the United States, unless Congress has so provided." Pet. App. 44. Here, the APA contains the only applicable cause of action and waiver of sovereign immunity.[2]

---

[2] The Commonwealth's reliance (Pet. 17-18) on *Maryland* v. *Soper*, 270 U.S. 36 (1926), is misplaced. In *Soper*, federal employees testified voluntarily, of their own free will, in the course of a state investigation, and this Court upheld the state courts' jurisdiction to prosecute them for testifying falsely. *Id.* at 39-40, 43. *Soper* does not suggest, in any

Although the Commonwealth alleges (Pet. 21-26) a conflict among the circuits, the cases that it cites are inapposite because they concerned federal district court subpoenas that were governed by the Federal Rules of Civil Procedure. In both *Exxon Shipping Co.* v. *Department of the Interior*, 34 F.3d 774 (9th Cir. 1994), and *Linder* v. *Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), federal district courts issued subpoenas in connection with underlying litigation. *Exxon* held that such subpoenas are governed by the general discovery rules set forth in the Federal Rules of Civil Procedure. 34 F.3d at 779. *Linder* assumed, without deciding, that the federal government is a "person" within the meaning of Rule 45 of the Federal Rules of Civil Procedure, and it therefore applied Rule 45 standards to a subpoena served on federal agencies. 251 F.3d at 180-181.

By contrast, as the Commonwealth admits (Pet. 22 n.6), here there is no underlying litigation and no district court subpoena. Instead, the Puerto Rico Department of Justice purported to issue subpoenas pursuant to Puerto Rico law. See Pet. 9 n.2. The Federal Rules of Civil Procedure thus have no application to these subpoenas, rendering *Exxon* and *Linder* inapposite. Indeed, *Exxon* expressly distinguished the federal-court subpoena in that case from subpoenas issued by state courts. 34 F.3d at 778. In the circumstances of this case, therefore, if a federal agency declines to produce documents requested by a state prosecutor's subpoena, "the sole remedy * * * is to file a collateral action in federal court under the APA." Pet. App. 18-19 n.6 (quoting *Houston Bus. Journal, Inc.* v. *Office of the Comp-*

way, that the States (or Puerto Rico) may compel federal officials to testify or otherwise produce evidence for purposes of state or local investigations.

*troller of the Currency*, 86 F.3d 1208, 1211-1212 (D.C. Cir. 1996)).

2. The Commonwealth alternatively contends (Pet. 31-38) that the court of appeals erred in determining that the FBI reasonably withheld the law enforcement materials sought by the Commonwealth. That fact-bound issue does not warrant this Court's review. The decision below does not conflict with any decision of another court of appeals and, indeed, it appears that the issue has never arisen before. See Pet. App. 2 (noting that this case presents "a novel question").

In any event, the decision below is correct. There can be no doubt that the materials sought by the Commonwealth are protected by the law enforcement privilege. This privilege, which is "rooted in common sense as well as common law," recognizes that "law enforcement operations cannot be effective if conducted in full public view." Pet. App. 23 (quoting *Black* v. *Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977)). Congress itself "recognized the necessity for such a privilege in the Freedom of Information Act," which exempts from disclosure documents whose production would "interfere with enforcement proceedings" or "endanger the life or physical safety of law enforcement personnel." *Black*, 564 F.2d at 546 & n.9 (quoting 5 U.S.C. 552(b)(7) (1970)). As this Court has explained, in enacting the FOIA exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

Although the Commonwealth does not take issue with these established principles, it suggests (Pet. 35-37) that the federal government's interest in maintaining

the confidentiality of its law enforcement records must yield to the Commonwealth's interest in investigating the operations of the FBI. The Commonwealth declares that "[t]here is an anomaly in the assertion of a public interest 'privilege' by one governmental entity in order to keep information from another governmental entity that is itself invested with the authority 'to investigate in the public interest.'" Pet. 34 (quoting *United States* v. *O'Neill*, 619 F.2d 222, 230 (3d Cir. 1980)). But that argument inverts the principles of federal supremacy on which *O'Neill* rested. *O'Neill* declared that "[t]here is an anomaly in the assertion of a public interest 'privilege' *by the City* to justify withholding information *from a federal Commission* charged by Congress to investigate in the public interest the possible denial of equal protection by, inter alia, local governmental units." *O'Neill*, 619 F.2d at 230 (emphases added). That case provides no support for the Commonwealth's assertion of unconstrained power to investigate the operations of the federal government.

Finally, the court of appeals correctly determined that the Commonwealth's contention (Pet. 27) that the district should have conducted an *in camera* examination of the materials sought, undertaken an item-by-item balancing of the interests at stake, and considered measures such as a protective order, was not made to the district court and was therefore forfeited. Pet. App. 28-29, 30-31. Moreover, while the Commonwealth objects (Pet. 35) to "categorical" determinations of privilege, the Commonwealth itself made no attempt to differentiate among the materials, and instead sought a broad permanent injunction barring the federal government "from withholding any information relevant to the Commonwealth's investigation, and ordering Defendants to com-

ply with the Commonwealth's requests and produce the subpoenaed information, objects and documents." Pet. App. 6a-7a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

JEFFREY S. BUCHOLTZ
*Acting Assistant Attorney General*

MARK B. STERN
ALISA B. KLEIN
*Attorneys*

FEBRUARY 2008